

OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS
Stella B. Werner Council Office Building
Rockville, Maryland 20850
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IN THE MATTER OF: *
ANA DAVID d/b/a New Angels Childcare *
Applicant * OZAH Case No. CU 19-08
Ana David *
For the Application *

Before: Martin L. Grossman, Hearing Examiner
Director, Office of Zoning and Administrative Hearings

HEARING EXAMINER'S REPORT AND DECISION

TABLE OF CONTENTS

I. STATEMENT OF THE CASE	2
II. FACTUAL BACKGROUND	3
A. The Subject Property	3
B. Surrounding Neighborhood	6
C. Proposed Use	8
1. Site Plan.....	9
2. Parking for the Residence and the Day Care.....	10
3. Site Landscaping, Lighting and Signage	12
4. Internal Physical Arrangements for Site Operations	13
5. Operations.....	13
D. Community Response.....	15
III. FINDINGS OF FACT AND CONCLUSIONS OF LAW.....	15
A. Necessary Findings (Section 59.7.3.1.E.)	16
B. Development Standards of the Zone (Article 59.4).....	24
C. Use Standards for a Group Day Care for 9 to 12 Persons (Section 59.3.4.4.D.).....	25
D. General Development Standards (Article 59.6)	26
1. Site Access Standards.....	27
2. Parking Spaces Required, Parking Facility Design and Parking Lot Screening	27
3. Site Lighting, Landscaping and Screening	28
4. Signage	30
IV. CONCLUSION AND DECISION	30

I. STATEMENT OF THE CASE

On June 5, 2019, the Applicant, Ana David, filed an application seeking approval of a conditional use to operate a Group Day Care for up to 12 children in her home at 9408 Weaver Street in Silver Spring. Her ownership of the property is established by her deed (Exhibit 15) and Maryland Real Property Records (Exhibit 22), showing an SDAT Tax Account Number of 13-01402392.¹ The Applicant currently runs a Family Day Care (New Angels Childcare) for up to eight children in her home, and wishes to expand to a 12-child Group Day Care.

The Subject Site is Lot 5, Block E, Franklin Vale Subdivision, and it is zoned R-60, as evidenced by the official zoning map of the area (Exhibit 14). The site is in the area subject to the 2000 *East Silver Spring Master Plan*. A conditional use is required for a child care facility for 9 to 12 children in the R-60 Zone (*i.e.*, a Group Day Care), pursuant to Zoning Ordinance §59.3.4.4.D (9-12 persons).

The Office of Zoning and Administrative Hearings (OZAH) scheduled a public hearing to be held on October 4, 2019, by notice issued on August 19, 2019 (Exhibit 19). The Technical Staff of the County's Planning Department (Technical Staff or Staff) issued a report on September 16, 2019, recommending approval of the application, subject to four conditions. Staff also recommended approval of a waiver of the requirement of Zoning Ordinance §59.6.2.4.C for one bicycle parking space. Exhibit 20.

The Planning Board met on September 26, 2019, and voted unanimously (5-0) to recommend approval with the conditions and waiver recommended by Staff. These recommendations are contained in the Chair's letter of September 26, 2019. Exhibit 21.

The application is supported by letters from parents of three children currently using the

¹ The SDAT record and her deed (Exhibit 15) show her full name as Ana David-Nunez, and she produced a passport and driver's license at the hearing demonstrating that she is that person. Exhibit 24 and Tr. 8-10, 12.

day care (Exhibit 10 and Attachment D to Exhibit 20) and one from Paulina Alvarado, the Quality Enhancement Coordinator of the Montgomery County Child Care Resource and Referral Center (Exhibit 9). There were no letters filed in opposition.

The public hearing proceeded as scheduled on October 4, 2019. The Applicant testified, *pro se*, and she was the only witness. At the hearing, the Applicant indicated that she accepted the findings in the Technical Staff report (Exhibit 20) as part of her evidence in the case and accepted the conditions proposed by Technical Staff, as adopted by the Planning Board. Tr. 12-13. She also agreed to the conditions that the Hearing Examiner indicated he would likely impose if he granted the conditional use (Exhibit 25 and Tr. 14-16).

The Applicant identified her plans (Exhibits 12 and 13) and photos of her home (Exhibits 16(a)-(g)), and she testified that there would be no signs posted and no external changes to her property. Tr. 13, 20-26. In response to a question from the Hearing Examiner, Ms. David indicated that her Fire Code Compliance Permit, which was allegedly expired according to a memo (Exhibit 8) from the Department of Permitting Services (DPS), had in fact been renewed, as confirmed in the record (Exhibits 7 and 26). Tr. 28-31. There was no opposition testimony.

The record was scheduled to close on October 9, 2019, upon receipt of the hearing transcript. The transcript was received on October 8, 2019, and the record closed, as scheduled, on October 9, 2019.

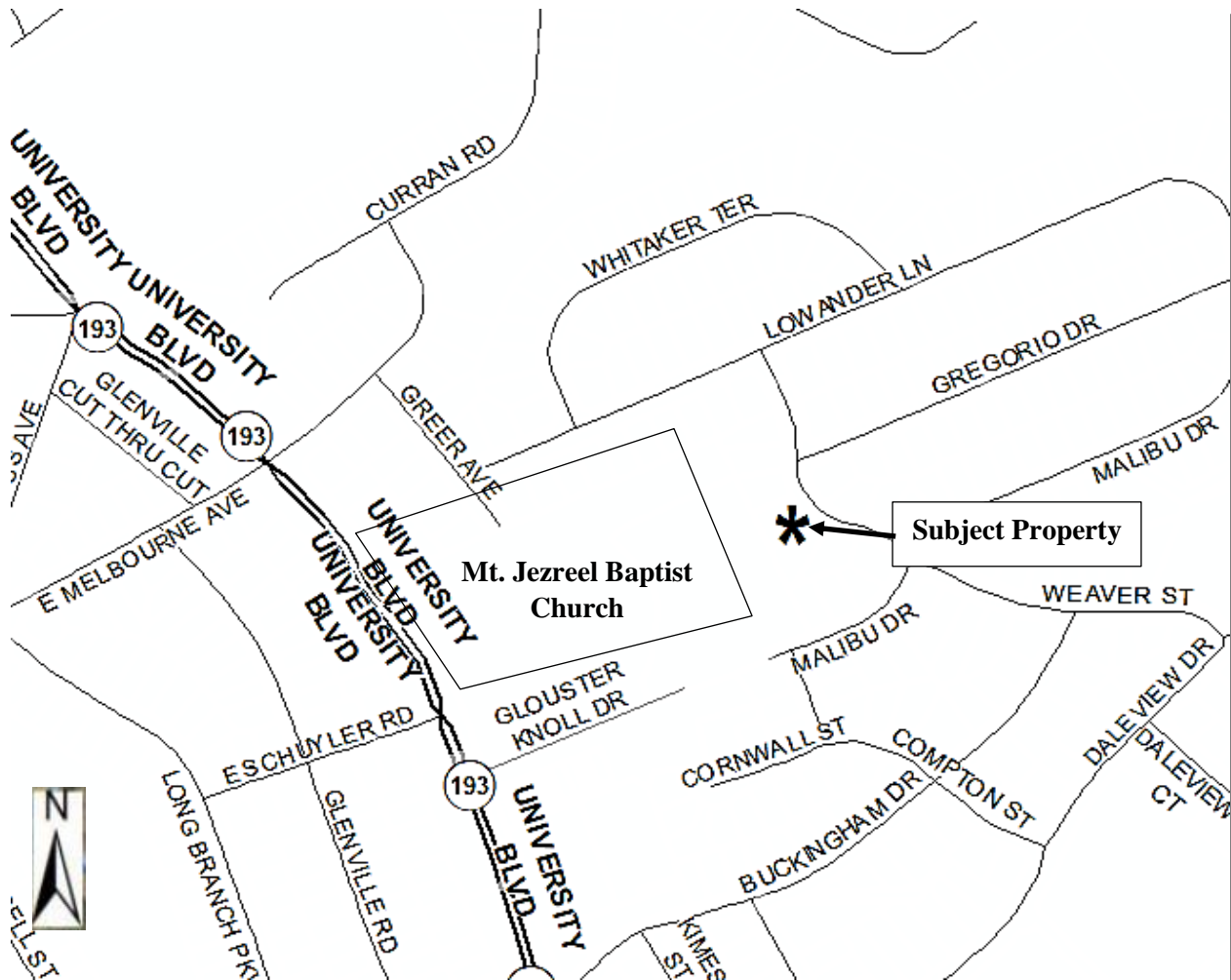
For the reasons set forth in this Report and Decision, the Hearing Examiner approves the conditional use application, subject to the conditions listed in Part IV, below.

II. FACTUAL BACKGROUND

A. The Subject Property

The subject site is located in Silver Spring about a half mile south of the Capital Beltway

(I-495) and a thousand feet east of University Boulevard East (MD 193). The location is shown below on a map provided by Technical Staff (Exhibit 20, p. 1):



Technical Staff described the subject site as follows (Exhibit 20, pp. 2-3):

The Subject Property is located at 9408 Weaver Street ("Property" or Site"), south of the intersection with Gregorio Drive in Silver Spring. The Property is zoned R-60 and contains 10,604 square feet of land. The Property is recorded in the County Land Records as Plat #4963, Lot 5, Block E, Franklin Vale Subdivision.

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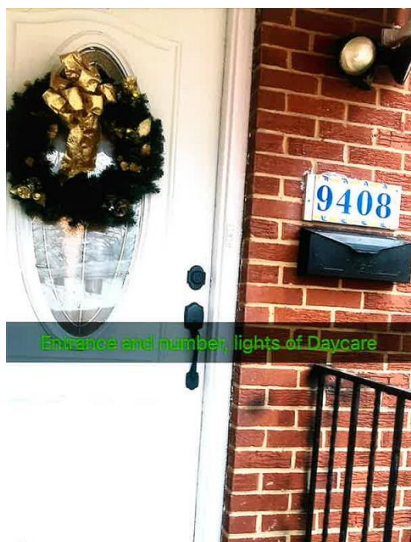
The Property is an irregular pentagon-shaped lot with approximately 54 feet of frontage on Weaver Street. It is developed with a single-family detached dwelling unit with a large concrete parking pad and driveway that access onto Weaver Street. Sidewalks are located along both sides of Weaver Street. A large tree and foundation plantings are located in the front yard of the dwelling unit. From the concrete parking pad in the front yard, a set of stairs lead to the front door, the main entrance to the

proposed use. There is a light fixture mounted to the right of the front door. The rear yard is enclosed with a chain link fence. Several large trees located in the rear yard provide shade to the enclosed play area.

Staff provided a photograph of the site, from Weaver Street (Exhibit 20, p. 2):



The Applicant has also provided numerous photographs of the exterior of her home (Exhibits 16(a)–(g)), samples of which are reproduced below:



**Entrance to Applicant's Home
(Exhibit 16(e))**



**Back Door & Rear Terrace, used for Infant Childcare
(Exhibit 16(c))**



**Playground for Infants & Toddlers
(Exhibit 16(b))**

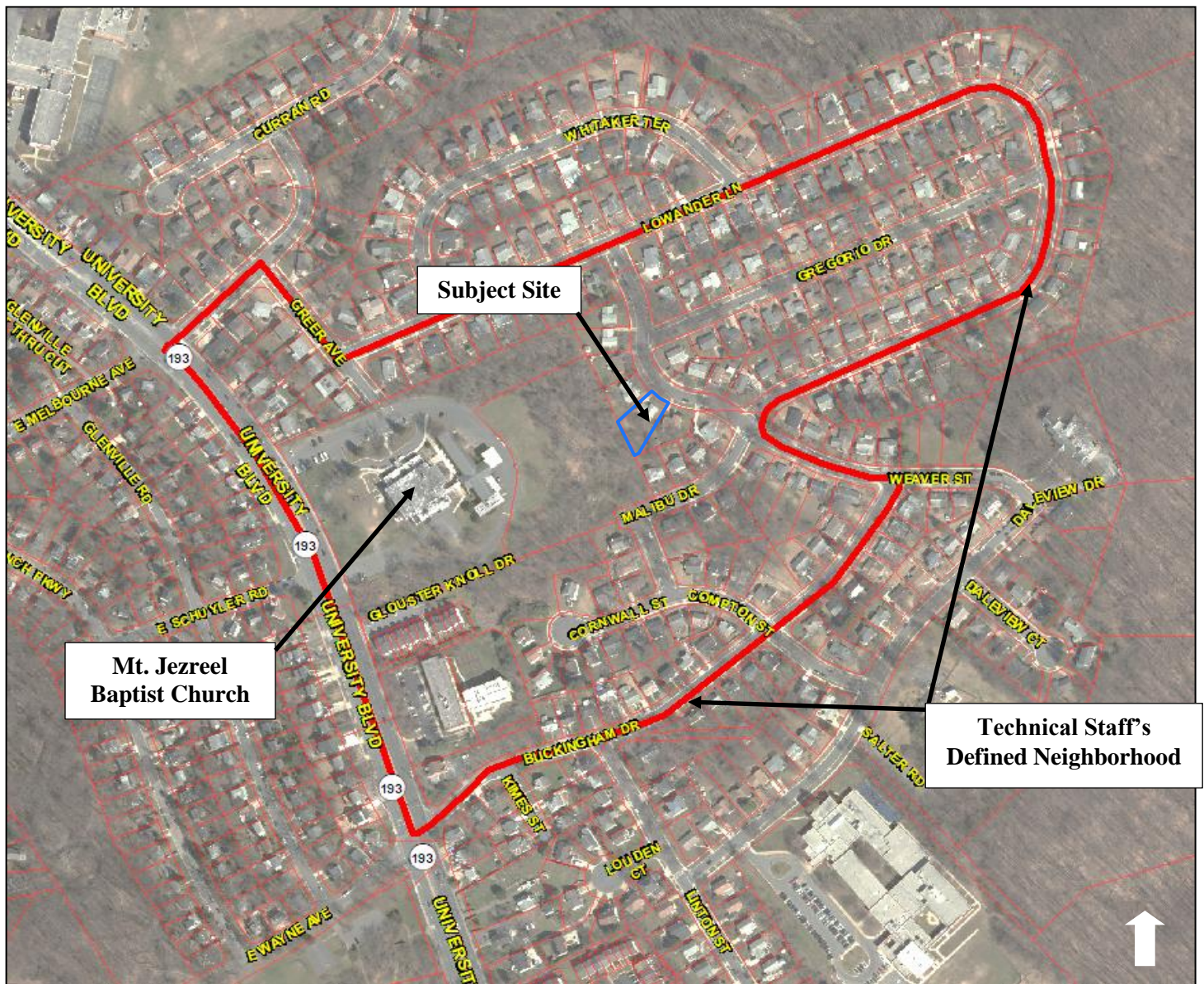


**Backyard Play Area & Equipment for Toddlers and Preschoolers
(Exhibit 16(d))**

B. Surrounding Neighborhood

For the purpose of determining the compatibility of the proposed use, it is necessary to delineate and characterize the “surrounding neighborhood” (*i.e.*, the area that will be most directly impacted by the proposed use). Staff proposed defining the boundaries of the surrounding neighborhood as “. . . bounded to the north by East Melbourne Avenue, Greer Avenue and Lowander Lane, to the east by Malibu Drive and Weaver Street, to the south by Buckingham Drive to the south and to the west by University Boulevard (MD 193).” Exhibit 20, p. 3.

While Staff could have defined the neighborhood more narrowly, the Hearing Examiner accepts Technical Staff’s definition of the neighborhood since it fairly includes the area that potentially will be most affected by the conditional use. It is depicted on the next page in an aerial photograph from page 3 of the Staff Report (Exhibit 20, p. 3):



Technical Staff described the neighborhood (Exhibit 20, p. 3) as:

“ . . . zoned R-60 and developed with one-family detached residential dwelling units, except for the RT-12.5 zoned properties developed as townhouses located southwest of the subject property. The Mount Jezreel Baptist Church located on MD 193 abuts the property along the western property line. There are three approved conditional uses located within the defined neighborhood as follows:

- S-2639 located at 440 East University Boulevard for the construction of an antenna to the existing building approved on July 27, 2005;

- S-2877 located at 426 East University Boulevard, the Mount Jezreel Baptist Church property, for an independent senior housing facility approved on November 22, 2016; and
- (CU)2017-12 located at 700 Buckingham Drive for a private club approved on May 5, 2017

C. Proposed Use

The Applicant seeks approval of a conditional use to expand her current Family Day Care for up to 8 children into a Group Day Care for up to 12 children in her home at 9408 Weaver Street in Silver Spring. As explained in Applicant's supporting information (Exhibit 11, p. 1):

Project Description

The Applicant, Ana David, is requesting a special exception to expand her existing eight-child family day care facility to a group day care facility for 12 children. The Applicant has been operating the family day care at this location since September 2017. She is now interested in expanding the family day care to a group day care for children six years old and younger.

The proposed group day care will be located on the main floor of the house, and basement which is where the existing day care is currently located. The Applicant will continue to use the second floor as her personal residence. Entrance to the day care is through the house's front door. There is an entrance to the kitchen and an entrance to the basement in the rear of the house.

Ana David Family Child Care doing business as "Angel Childcare"

I am currently Registered by the Office of Child Care in operation since 9/26/2017, to take care of 8 children under the age of 6 years, I provide Care on my own residency single-family, detached home located at 9408 Weaver Street Silver Spring, MD 20901. The Child Care currently counts with 2 staff members including myself and my Additional Adult, Arlen Ramirez. With the growing need and demand for high quality child care in my neighborhood, I am considering the expansion of my Home childcare to be able serve more families in need of quality day care. I am participating in the Quality Rating and Improving System, Maryland Excels. As part of the requirement for the expansion I am requesting a Conditional Use Permit to expand my existing daycare to Large Family Child Care to be able to take care for 12 children under the age of 6 years old. The current and proposed hours of operation are Monday through Friday from 7:00 AM to 6:00 PM.

We offer a trilingual program (English, French and Spanish). We offer a program with weekly lesson plans based on an approved Maryland State Department of

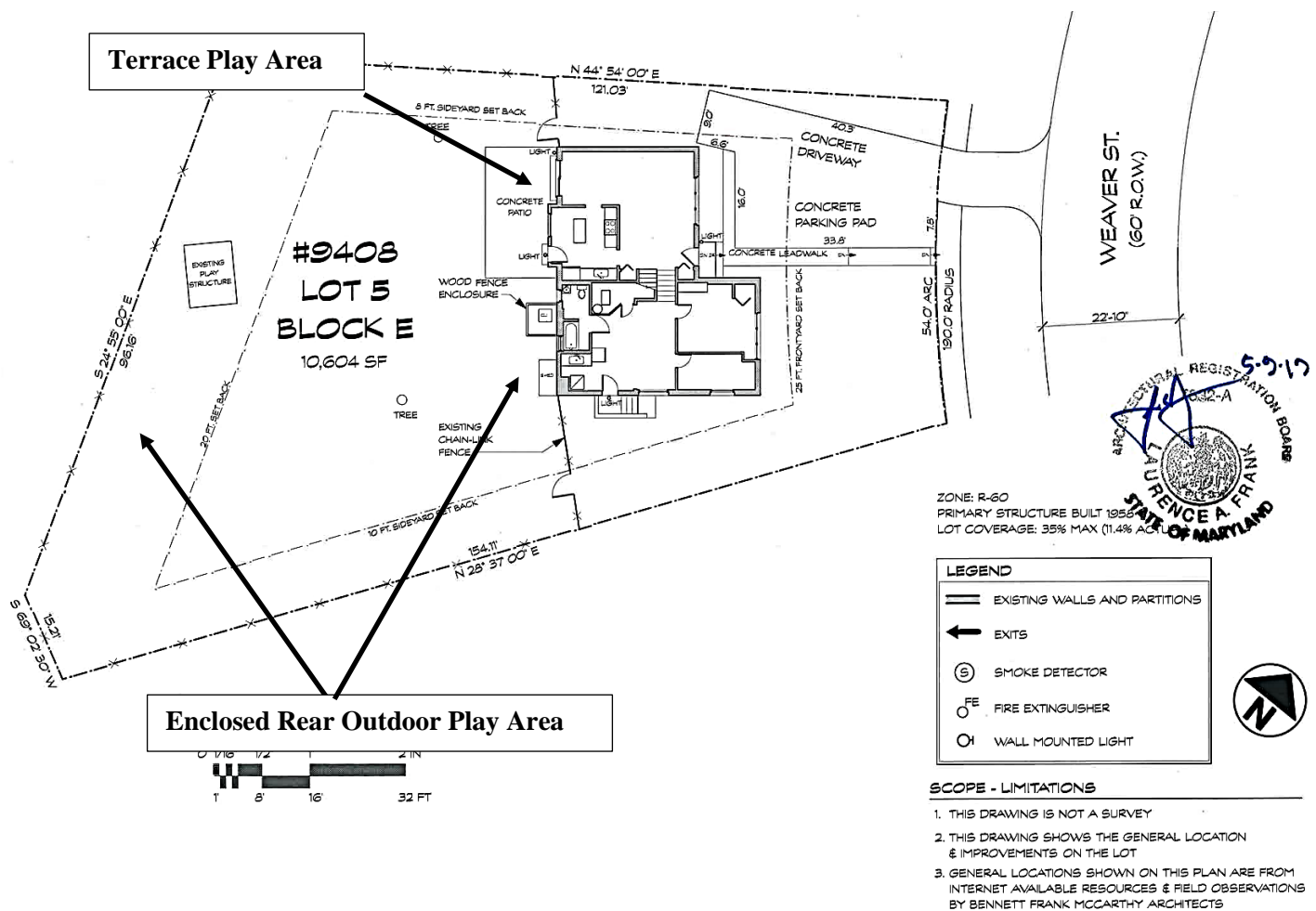
Education curriculum that is developmentally appropriate that meets the individual child's needs and interest.

We continually receive calls and emails from parents requesting childcare, because of the current client recommendations who value the high-quality, educational program that we offer.

Due to the location of the property located in an R-60 residential zone area, a conditional use permit for the expansion is required.

1. Site Plan

The Applicant's Conditional Use Site Plan (Exhibit 12) is reproduced below:

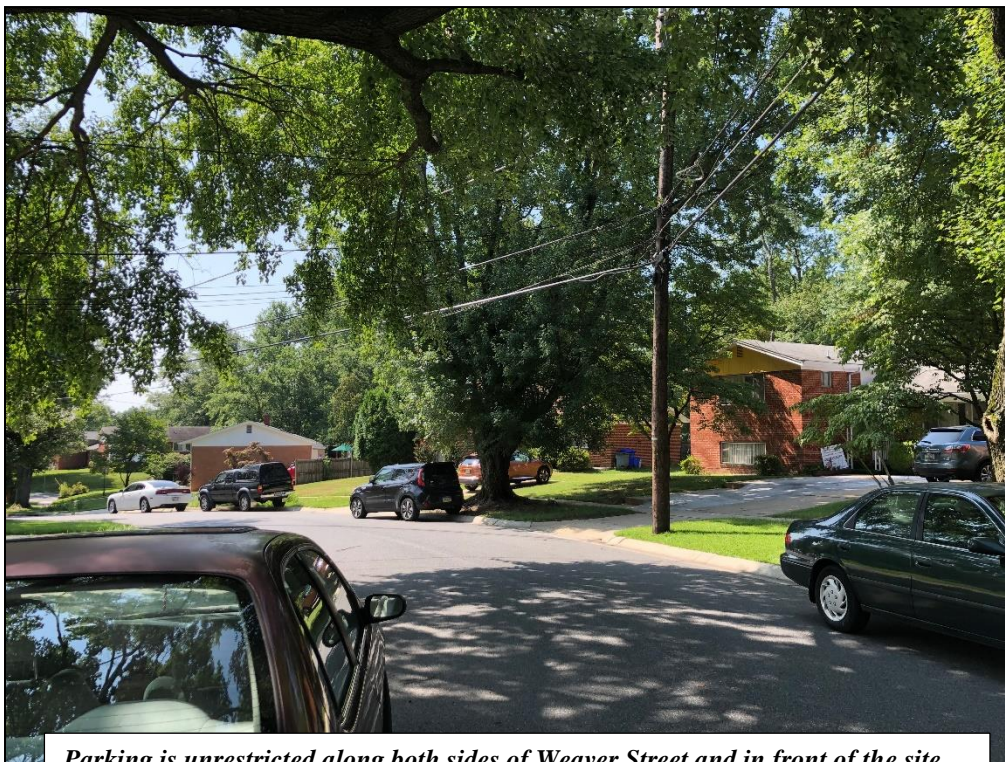


As can be seen, the above Conditional Use Site Plan shows the fenced-in outdoor play area on the west (rear) side of the site and the large driveway and concrete parking pad on the east

(front) side of the site. Technical Staff notes that “There will be no physical changes to the residence. No additional landscaping is proposed. No additional lighting is proposed by the Applicant as the existing lighting, residential in nature, will remain unchanged. There is no signage proposed under this application.” Exhibit 20, p. 4. The Applicant confirmed these plans in her testimony. Tr. 13, 20-26.

2. Parking for the Residence and the Day Care

The Applicant will have two on-site parking spaces on the concrete pad in front of the house. The Applicant plans two non-resident employees in addition to herself, and thus Zoning Ordinance §59.6.2.4.B. requires a total of four vehicle parking spaces (two for the non-resident employees and two for the residence); however, the provision also specifies that “Required spaces may be allowed on the street abutting the site,” and unrestricted on-street parking is allowed on both sides of Weaver Street, as shown in the following photograph from the Staff Report depicting parking near the Applicant’s residence (Exhibit 20, pp. 7-9):



Parking is unrestricted along both sides of Weaver Street and in front of the site

Technical Staff observed (Exhibit 20, p. 13), “The Applicant will use the driveway and street frontage along Weaver Street for drop-off and pick-up of children. Employees do not drive to the site but do take public transportation or walk. This commuting practice will continue in the future.” Staff concluded that the parking to be provided would be adequate for the use, as long as the Applicant is required to follow a schedule limiting the use to one vehicle for drop-off/pick-up operations every 15 minutes during both the morning and evening peak periods (Exhibit 20, pp. 8-9).

The Hearing Examiner agrees and such a condition has been imposed in Part IV of this Report and Decision. Moreover, since some drop-offs and pick-ups may occur on the street, he has imposed an additional condition for safety, requiring that:

Children must be accompanied by an adult to and from the child-care entrance, and when drop-offs or pickups are made by vehicle outside of the Applicant’s driveway, children must embark or disembark the vehicle from the curb side.

Finally, the Applicant has requested a waiver of the requirement in Zoning Ordinance §59.6.2.4.C for one bicycle parking space on the site (Exhibit 20, Attachment E). Both Technical Staff and the Planning Board recommended approval of the requested waiver (Exhibit 20, p. 9 and Exhibit 21). Technical Staff set forth its rationale for supporting the waiver (Exhibit 20, p. 9):

An indoor bicycle space will need to comply with Zoning Ordinance design and maneuverability standards and could decrease the amount of square footage allotted to the proposed group day care use. An outdoor bicycle storage locker would need to be constructed and appropriately screened from other residential uses. These site design improvements with additional landscaping could change the appearance of the residential property as outdoor bicycle storage lockers are not usually found on R-60 zoned lots.

* * *

Staff believes that . . . it is highly unlikely that future clients or staff will bike to the site. Thus, Staff supports the Applicant’s waiver request for the one required bicycle parking space.

Based on this evidence, the Hearing Examiner finds that a waiver of the requirement for a

bicycle parking space on this site is appropriate, and that waiver is granted in Part IV of this Report and Decision.

3. Site Landscaping, Lighting and Signage

The trees and lighting on the site are depicted on the Site Plan (Exhibit 12), and they will remain unchanged for the conditional use. Exhibit 20, p. 4. and Tr. 13. According to Technical Staff, a large tree and foundation plantings are located in the front yard of the home. The rear yard is enclosed with a chain link fence, and several large trees located in the rear yard provide shade to the enclosed play area. Exhibit 20, pp. 2-3.

Technical Staff also found that, “The site is well landscaped,” and since there will be no physical changes to the property or structure under this request, “The existing on-site landscaping and screening will continue to ensure the compatibility of this conditional use to the surrounding neighborhood.” Exhibit 20, pp. 10 and 13.

There is no contrary evidence in the record, and the Hearing Examiner therefore finds that the existing landscaping will be adequate to ensure compatibility with the neighborhood.

There is a light fixture mounted to the right of the front door. As stated by Technical Staff (Exhibit 20, p. 9):

The Applicant is not proposing new outdoor lighting for the group day care facility. The existing lighting fixture to the right of the front door will remain. The existing on-site lighting is residential in nature and will not create a problem with illumination on abutting properties.

There is no contrary evidence in the record, and the Hearing Examiner therefore finds that the existing lighting will not create glare into the abutting properties and is therefore compatible with the neighborhood.

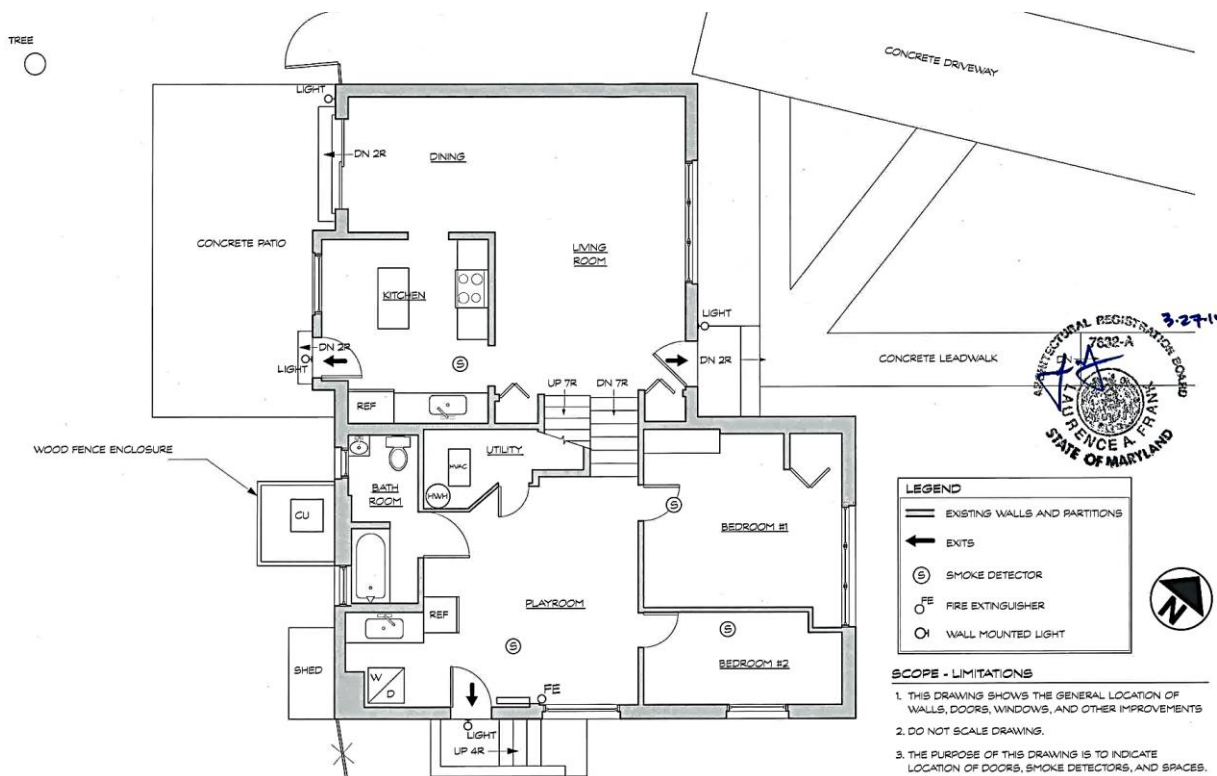
Finally, as noted by Staff, “There is no signage proposed under this application.” Exhibit 20, p. 4. and Tr. 13. The Hearing Examiner added the following condition regarding signage:

The Applicant must not display a sign for the child care facility unless it is first approved by the Department of Permitting Services (DPS) and a permit is obtained. Pursuant to Zoning Ordinance §59.6.7.8.A, a sign, if erected, must not exceed two square feet and must not be lighted. A copy of the permit must be filed with OZAH before any sign is posted.

4. Internal Physical Arrangements for Site Operations

The existing Family Day Care operates in the main floor and basement of the Applicant's home, and will continue to do so when expanded into a Group Day Care. Exhibit 11. According to Technical Staff, "There will be no physical changes to the residence." Exhibit 20, p. 4.

Applicant's "Floor Plan" (Exhibit 13) is shown below:



5. Operations

Proposed operations were summarized by Technical Staff (Exhibit 20, p. 4):

The proposed group day care facility will be in a portion of the house's first floor and basement and will consist of approximately 797 square feet. Two non-resident employees and the resident owner will be associated with the use. The hours of operation will be 7:00 am to 6:00 pm, Monday through Friday.

Arrival times for staff and children will occur between 7:00 a.m. and 10:00 a.m., while departure times will occur between 4:30 p.m. and 6:00 p.m. There will be no more than five parents on-site to either drop off or pick up children during any-one-hour period. Existing staff use public transportation or walk to the site. This commuting practice by staff will continue under the requested use. Two parking spaces are proposed for the use.

To minimize impacts on the neighbors, Technical Staff proposed a condition specifying staggered vehicular arrivals (Exhibit 20, p. 2). The Hearing Examiner adopted a similar condition, but added a proviso ensuring parental agreement to this procedure. The condition, as imposed by the Hearing Examiner, reads:

The Applicant must schedule staggered drop-off and pick-up of children with no more than one vehicle entering and exiting the site every 15 minutes during both morning and evening drop-offs and pick-ups. The Applicant must require written parental agreements so indicating for all children arriving by vehicle.

The Applicant provided a schedule for the parent drop-off and pick-up process with 12 children in her supporting information (Exhibit 11, p. 3):

PROPOSED DROP OFF AND PICK UP

Number of residents in household: 2 Adults, 1 child 10 years old.

Planned Number of Employee: Provider (resident), 2 Staff Member (40 hours).

Planned Number of Children Licensed: 12 children.

Planned Number of Children enrolled: 12 children.

Planned Hours of operation: 7:00 AM to 6:00 PM, Monday Through Friday.

Planned Drop-off and Pick up Schedule:

7:00 Owner/provider Clock in.

7:15 AM Child 1, DROP-OFF.

7:30 AM Child 2, DROP-OFF.

7:45 AM Child 3, DROP-OFF.

8:00 AM Staff Member- Walking- 1 Clock in.

8:15 AM Child 4, DROP-OFF.

8:30 AM Child 5, DROP-OFF.

8:45 AM Child 6 and 7, DROP-OFFS.

9:00 AM Child 8, DROP-OFF.

9:00 AM Staff Member- Public Transportation- 2 Clock in.

9:15 AM Child 9, DROP-OFF.

9:30 AM Child 10, DROP-OFF.

9:45 AM Child 11, DROP-OFF.

10:00 AM Child 12, DROP-OFF.

4:30 PM Child 1, PICK UP.

4:45 PM Child 2, PICK UP.

5:00 PM Child 3, PICK UP.

5:00 PM Staff member 1 Clock out.

5:15 PM Child 4, PICK UP.

5:30 PM Child 5, PICK UP.

5:45 PM Child 6 and 7, PICK UP

6:00 PM Child 8, 9, 10 & 12 PICK UP.

6:00 PM Provider and Staff member 2 Clock out.

The potential impacts of the proposed operations on the neighborhood and the transportation system are further discussed in Part III of this Report and Decision.

D. Community Response

The application is supported by letters from parents of three children currently using the day care (Exhibit 10 and Attachment D to Exhibit 20) and one from Paulina Alvarado, the Quality Enhancement Coordinator of the Montgomery County Child Care Resource and Referral Center (Exhibit 9). There were no letters filed in opposition.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A conditional use is a zoning device that authorizes certain uses provided that pre-set legislative standards are met. Pre-set legislative standards are both specific and general. General standards are those findings that must be made for almost all conditional uses. *Zoning Ordinance*, §59.7.3.1.E. Specific standards are those which apply to the particular use requested, in this case, a child Group Day Care for up to 12 children. *Zoning Ordinance* §59.3.4.4.D.

Weighing all the testimony and evidence of record under the “preponderance of the evidence” standard specified in *Zoning Ordinance* §59.7.1.1, the Hearing Examiner concludes that the proposed conditional use, as governed by the conditions imposed in Part IV of this Report and Decision, would satisfy all of the specific and general requirements for the use.

A. Necessary Findings (Section 59.7.3.1.E.)

The general findings necessary to approve a conditional use are found in Section 59.7.3.1.E of the Zoning Ordinance. Standards pertinent to this review, and the Hearing Examiner's conclusions for each finding, are set forth below:²

E. Necessary Findings***1. To approve a conditional use application, the Hearing Examiner must find that the proposed development:***

a. satisfies any applicable previous approval on the subject site or, if not, that the previous approval must be amended;

Conclusion: Technical Staff advises that there are no previously approved conditional uses associated with this site. Exhibit 20, p. 10. Therefore, the Hearing Examiner finds that this standard is inapplicable to the subject application.

b. satisfies the requirements of the zone, use standards under Article 59-3, and to the extent the Hearing Examiner finds necessary to ensure compatibility, meets applicable general requirements under Article 59-6;

Conclusion: This subsection requires an analysis of the standards of the R-60 Zone contained in Article 59-4; the use standards for Group Day Care for 9 to 12 Persons contained in Article 59-3; and the applicable development standards contained in Article 59-6, to the extent the Hearing Examiner finds necessary to ensure compatibility.

Each of these Articles is discussed below in separate sections of this Report and Decision (Parts III.B, C, and D, respectively). Based on the analysis contained in those discussions, the Hearing Examiner finds, as did Technical Staff (Exhibit 20, pp. 6-14), that the application satisfies the requirements of Articles 59-3, 59-4 and 59-6.

² Although §59.7.3.1.E. contains six subsections (E.1. through E.6.), only subsections 59.7.3.1.E.1., E.2. and E.3. contain provisions that arguably apply to this application. Section 59.7.3.1.E.1. contains seven subparts, a. through g.

c. substantially conforms with the recommendations of the applicable master plan;

The subject property lies within the geographic area covered by the 2000 *East Silver Spring Plan Master Plan*. Technical Staff discussed the Master Plan, as follows (Exhibit 20, pp. 6-7):

The site is located within the 2000 *East Silver Spring Master Plan* area which reconfirmed the R-60 zone for the site. While the Plan contains no specific recommendations for the site, it does offer the following relevant Goals and Objectives:

Land Use and Zoning

- *Preserve the residential character of East Silver Spring neighborhoods. (p. 6)*
- *Retain the existing single-family detached character throughout most of East Silver Spring. (p. 26)*

Public Facility and Community

- *Support the provision and location of adequate social, employment, and health facilities and services to meet the needs of area residents. (p. 28)*

Additionally, the Master Plan offered guidelines for the location of special exception land uses (now referred to as conditional uses) in residential areas. The following Guideline is applicable to this site:

- *New development, infill development, redevelopment and special exception uses should be compatible with the existing residential character. As a result, the existing land use pattern should remain essentially the same. Non-residential special exceptions are discouraged in predominantly residential areas to maintain residential character. (p. 26)*

The requested conditional use, for a group day care facility, will be in an existing one-family residence. There are no exterior changes proposed with this use. The proposed use conforms to the Master Plan's recommendations for new conditional uses meeting the social needs of the community through the provision of a group day care facility and by ensuring these new uses continue to maintain a residential appearance in the community.

Conclusion: There is no evidence in the record contrary to Technical Staff's findings on this issue.

Based on that fact and the language of the Master Plan, the Hearing Examiner concludes that the proposed conditional use substantially conforms with the recommendations of the applicable 2000 *East Silver Spring Master Plan*, which "Support[s] the provision and location of adequate social,

employment, and health facilities and services to meet the needs of area residents.” Master Plan, p. 28. Moreover, because the proposed use maintains its existing residential appearance, it will preserve the residential character of the neighborhood, as recommended by the Mater Plan (at p. 6).

d. is harmonious with and will not alter the character of the surrounding neighborhood in a manner inconsistent with the plan;

Conclusion: Technical Staff found that the proposed use meets this standard (Exhibit 20, pp. 11-12):

The proposed use will be harmonious with the character of the surrounding one-family neighborhood. There are no new structures proposed by this conditional use nor will the scale or design of the existing residential use increase in size. The activities and traffic conditions associated with the use will be limited to specific hours of operation and days of the week, as stated in the recommended conditions of approval. Therefore, the proposed use will not alter the character of the surrounding neighborhood in a manner inconsistent with the Master Plan.

The Hearing Examiner concludes that the proposed use “*is harmonious with and will not alter the character of the surrounding neighborhood*” because it will remain a single-family, detached residence in a neighborhood of single-family, detached residences; and no external modifications to the home are planned. As noted above, it is consistent with the applicable Master Plan.

e. will not, when evaluated in conjunction with existing and approved conditional uses in any neighboring Residential Detached zone, increase the number, intensity, or scope of conditional uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area; a conditional use application that substantially conforms with the recommendations of a master plan does not alter the nature of an area;

Conclusion: According to Technical Staff, the defined neighborhood contains three other special exceptions/conditional uses – an antenna on an existing building; a senior housing facility located on church property and a private club.

. As stated by Staff (Exhibit 20, p. 12):

. . . The requested use does not significantly increase the number of conditional uses in a manner that would affect the area adversely or alter its residential nature. Moreover, the proposed use conforms with the Master Plan recommendation for offering child day care facilities in the Silver Spring area.

The Hearing Examiner agrees with Technical Staff that the addition of the proposed 12-child Group Day Care will not result in an overconcentration of day care facilities (or other conditional uses) in the area. The proposed expansion of the existing Family Day Care into a Group Day care will not alter the residential nature of the area. A day care facility already exists in the home, and it will remain a single-family, detached home. Moreover, the provision in question also specifies that “*a conditional use application that substantially conforms with the recommendations of a master plan does not alter the nature of an area,*” and as noted above, the proposed use is consistent with the Master Plan. Thus, the Hearing Examiner finds that this standard has been met.

f. will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage, and other public facilities. If an approved adequate public facilities test is currently valid and the impact of the conditional use is equal to or less than what was approved, a new adequate public facilities test is not required. If an adequate public facilities test is required and:

- i. if a preliminary subdivision plan is not filed concurrently or required subsequently, the Hearing Examiner must find that the proposed development will be served by adequate public services and facilities, including schools, police and fire protection, water, sanitary sewer, public roads, and storm drainage; or*
- ii. if a preliminary subdivision plan is filed concurrently or required subsequently, the Planning Board must find that the proposed development will be served by adequate public services and facilities, including schools, police and fire protection, water, sanitary sewer, public roads, and storm drainage; and*

Conclusion: According to Technical Staff, the application does not require approval of a preliminary plan of subdivision, as the property was subdivided in 1957. Exhibit 20, p. 12. Therefore, the Hearing Examiner must determine whether the proposed development will be served by adequate public services and facilities. By its nature, a small child care facility operating within an existing single-family residence will not ordinarily create significant additional burdens for schools, police and fire protection, water, sanitary sewer and storm drainage.

Moreover, the expert analysis by Technical Staff did not find significant impacts on transportation facilities from the proposed conditional use. Technical Staff analyzed that impact in accord with Local Area Transportation Review (LATR), as set forth in Exhibit 20, pp. 7-8:

The requested conditional use satisfies the Local Area Transportation Review (LATR) and will have no adverse impacts to existing roadway conditions or pedestrian facilities [if limited as proposed in its recommended conditions].

* * *

Adequate Public Facilities

The proposed development is estimated to generate 17 person trips during both the typical weekday morning (6:30 a.m. – 9:30 a.m.) and evening (4:00 p.m. – 7:00 p.m.) peak periods. A summary of the estimated trip generation is provided in Table 2. Because the estimated transportation impact of the Project is less than 50 net new person trips, the Project satisfies the Local Area Transportation Review requirement without further analysis.

Table 2: Project Peak Hour Trip Generation

Total Proposed		Vehicle Rates		Policy Area Vehicle Trips		Person Trips	
Use	Total Units/GFA	AM	PM	AM	PM	AM	PM
Proposed Use							
Daycare Center (3 Employees)		13	13	11	11	17	17
Total Net New Trips		13	13	11	11	17	17

* Institute of Transportation Engineers Trip Generation Manual, 10th Edition; Land Use Code 565.

The Applicant also addressed the impact on transportation facilities in her supporting information, where she provided a schedule for drop-offs and pickups of children (Exhibit 11, p. 3). That schedule is reproduced on pages 14-15 of this Report and Decision. As discussed in Part

II.C.5 of this Report and Decision, and as required by a conditions imposed in Part IV, she will have contractual arrangements with her clients to ensure staggered arrivals and pick-up times, which will reduce any additional burdens on the transportation system.

With regard to environmental facilities, Technical Staff found that (Exhibit 20, p. 10):

There are no champion trees on or near the Property. The Property is exempt from the Forest Conservation Law because it is less than 40,000 square feet. A non-applicability form was confirmed by Staff on May 31, 2019 and was included in the submittal package. Therefore, no forest conservation or environmental issues are associated with this proposed use.

Staff also noted that “There are no land disturbing activities associated with the requested use [and] therefore, the existing storm drainage facilities are adequate for the site.” Exhibit 20, p. 12. Technical Staff concluded that “The Property is served by adequate public services and facilities..” Exhibit 20, p. 12. Based on this record, the Hearing Examiner finds that the proposed use will be served by adequate public services and facilities. LATR standards have been met, and the addition of four children and one employee to the facility will not unduly burden local facilities.

g. will not cause undue harm to the neighborhood as a result of a non-inherent adverse effect alone or the combination of an inherent and a non-inherent adverse effect in any of the following categories:

- i. the use, peaceful enjoyment, economic value or development potential of abutting and confronting properties or the general neighborhood;***
- ii. traffic, noise, odors, dust, illumination, or a lack of parking; or***
- iii. the health, safety, or welfare of neighboring residents, visitors, or employees.***

Conclusion: This standard requires consideration of the inherent and non-inherent adverse effects of the proposed use, at the proposed location, on nearby properties and the general neighborhood.

Inherent adverse effects are “adverse effects created by physical or operational characteristics of a conditional use necessarily associated with a particular use, regardless of its physical size or

scale of operations.” Zoning Ordinance, §59.1.4.2. Non-inherent adverse effects are “adverse effects created by physical or operational characteristics of a conditional use not necessarily associated with the particular use or created by an unusual characteristic of the site.” Id.

As specified in §59.7.3.1.E.1.g., quoted above, inherent adverse effects, alone, are not a sufficient basis for denial of a conditional use. However, non-inherent adverse effects in the listed categories, alone or in conjunction with inherent effects in those categories, are a sufficient basis to deny a conditional use. Nevertheless, the existence of a non-inherent adverse effect does not mean that an application for a conditional use must be denied. Rather, it means that it can result in denial if the Hearing Examiner finds that such a non-inherent adverse effect, either alone or in combination with inherent adverse effects, creates “undue harm to the neighborhood” in any of the categories listed in Zoning Ordinance §59.7.3.1.E.1.g.

Analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with a Group Day Care facility. Characteristics of the proposed use that are consistent with the characteristics thus identified will be considered inherent adverse effects. Physical and operational characteristics of the proposed use that are not consistent with the characteristics identified *or* adverse effects created by unusual site conditions, will be considered non-inherent adverse effects. The inherent and non-inherent effects then must be analyzed, in the context of the subject property and the surrounding neighborhood, to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

In analyzing potential adverse effects, Technical Staff considered the size, scale, scope, light, noise, traffic and environmental effects of the proposed use. Staff determined that the following physical and operational characteristics are necessarily associated with (*i.e.*, are inherent

in) a Group Day Care facility (Exhibit 20, p. 13): (1) vehicular trips to and from the site; (2) outdoor play areas; and (3) noise generated by children. The list of inherent characteristics for this type of use usually also includes (4) drop-off and pick-up areas; and (5) lighting, and the Hearing Examiner adds them to his listing of inherent characteristics of a Group Day Care.

Staff then examined the characteristics of the proposed use and concluded (Exhibit 20, p. 13):

With the development conditions as proposed by staff, there are no adverse traffic impacts that would result from the proposed conditional use. The Applicant will use the driveway and street frontage along Weaver Street for drop-off and pick-up of children. Employees do not drive to the site but do take public transportation or walk. This commuting practice will continue in the future. Outdoor play will not begin before 9:00 a.m. and no outdoor play is permitted after 5:00 p.m. as recommended by staff. No new lighting is proposed, and all lighting is adequate and consistent with the residential character of the neighborhood. The site is well landscaped, the entire rear yard is enclosed with a chain link fence. There are no non-inherent characteristics associated with this proposed conditional use.

The Hearing Examiner agrees with Staff's conclusion in this regard. While any Group Day Care may have some adverse effects on the neighbors (*e.g.*, from the noise of outdoor play and additional traffic), there is no characteristic of the proposed use or the site that would differentiate the effects of this proposed Group Day Care from any other such facility. Thus, the Hearing Examiner finds no non-inherent adverse effects.

Moreover, there have been no concerns raised by the neighbors, and the Hearing Examiner has imposed conditions in Part IV of this Report and Decision that should minimize any adverse effects.

Conclusion: The Hearing Examiner finds that the proposed Group Day Care for no more than 12 children, as limited by the conditions imposed in Part IV of this Report and Decision, will not cause undue harm to the neighborhood as a result of adverse effects in any of the categories listed in §59.7.3.1.E.1.g.

2. Any structure to be constructed, reconstructed, or altered under a conditional use in a Residential Detached zone must be compatible with the character of the residential neighborhood.

Conclusion: As observed by Technical Staff (Exhibit 20, p. 13), this provision is “Not applicable as no construction, reconstruction or alterations to the existing residence are proposed by this conditional use.” The Hearing Examiner agrees with Staff’s conclusion, and notes that the site will continue to be compatible with the neighborhood.

3. The fact that a proposed use satisfies all specific requirements to approve a conditional use does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require conditional use approval.

Conclusion: The application satisfies all specific requirements for the conditional use, and as discussed above, the proposed use will be compatible with the neighborhood. The Hearing Examiner concludes that, with the conditions imposed in Part IV of this Report and Decision, the conditional use should be approved.

B. Development Standards of the Zone (Article 59.4)

In order to approve a conditional use, the Hearing Examiner must find that the application meets the development standards of the zone where the use will be located – in this case, the R-60 Zone. Development standards for the R-60 Zone are contained §59.4.4.9.B. of the Zoning Ordinance. Staff compared the minimum development standards of the R-60 Zone to those provided by the application in a Table included in the Staff Report (Exhibit 20, p. 6), and reproduced below. The Hearing Examiner notes that the last row in the Table addresses the General Development Standard for vehicular parking spaces under §59.6.2.4.B., not a standard of the R-60 Zone under Zoning Ordinance §59. 4.4.9.B.

Development Standards- Section 59.4.4.9.B**Table 1 Development Standards for the R 60 Zone**

Development Standards	Required	Proposed
Minimum Lot Area (59.4.4.9.B.1)	6,000 sf	10,604 sf
Minimum Lot Width (59.4.4.9.B.1) <ul style="list-style-type: none"> At front building line At front lot line 	60 ft. 25 ft.	60 ft. 54 ft.
Maximum Lot Coverage (59.4.4.9.B.1)	35%	11.4%
Minimum Building Setback (59.4.4.9.B.2) <ul style="list-style-type: none"> Front Side Rear 	25 ft. 8/18 ft. 20 ft.	30 ft. 11/30 ft. 60 ft.
Maximum Building Height (59.4.4.9.B.3)	35 ft.	35 ft.
Parking Requirements (59.6.2.4.B)	4 spaces	4 spaces *

* The residential use requires 2 parking spaces and the proposed group day care facility requires 1 parking space for each employee, thus 2 employee parking spaces required. According to Section 59.6.2.3.A.5.b of the Zoning Ordinance, any on-street parking in a right-of way can be counted toward the minimum number of required parking spaces if the space is abutting or confronting the subject property.

Conclusion: As can be seen from the above Table, and as concluded by Technical Staff, “The proposed use meets the R-60 Zone Development Standards . . .” (Exhibit 20, p. 6). The Hearing Examiner so finds.

C. Use Standards for a Group Day Care for 9 to 12 Persons (Section 59.3.4.4.D.)

The specific use standards for approval of a Group Day Care for 9 to 12 Persons are set out in Section 59.3.4.4.D. of the Zoning Ordinance. Standards applicable to this application are:

1. Defined

Group Day Care (9-12 Persons) means a Day Care Facility for 9 to 12 people where staffing, operations, and structures comply with State and local regulations and the provider’s own children under the age of 6 are counted towards the maximum number of people allowed.

Conclusion: The Applicant is required to have staffing, operations, and structures compliant with State and local regulations, as a condition of the Conditional Use approval.

2. Use Standards

a. Where a Group Day Care (9-12 Persons) is allowed as a limited use, it must satisfy the following standards:

- i. The facility must not be located in a townhouse or duplex building type.*
- ii. In a detached house, the registrant is the provider and a resident. If the provider is not a resident, the provider may file a conditional use application for a Day Care Center (13-30 Persons) (see Section 3.4.4.E).*
- iii. In a detached house, no more than 3 non-resident staff members are on-site at any time.*
- iv. In the AR zone, this use may be prohibited under Section 3.1.5, Transferable Development Rights.*

Conclusion: The proposed Group Day Care may only be allowed as a conditional use, not a limited use, in the R-60 Zone, so the limited use provision is not applicable.

b. Where a Group Day Care (9-12 Persons) is allowed as a conditional use, it may be permitted by the Hearing Examiner under all limited use standards and Section 7.3.1, Conditional Use.

Conclusion: The Hearing Examiner finds that all of the limited use standards, incorporated into the conditional use standards, are satisfied in this case, in that:

- i) The facility is not located in a townhouse or duplex; it is in a detached, single-family home;
- ii) The Applicant is the provider and a resident;
- iii) No more than two non-resident staff members will be on-site at any time; and
- iv) The Subject Site is not located in the AR Zone.

Furthermore, as discussed in Part III.A., above, the general Conditional Use standards contained Zoning Ordinance §59.7.3.1 have been satisfied. In sum, the Hearing Examiner finds that the application satisfies all of the use standards in Zoning Ordinance §59.3.4.4.D.

D. General Development Standards (Article 59.6)

Article 59.6 sets the general requirements for site access, parking, screening, landscaping, lighting, and signs. The applicable requirements, and whether the use meets these requirements, are discussed below.

1. Site Access Standards

Conclusion: Zoning Ordinance Division 59.6.1 governs “Site Access;” however, by its own terms, as stated in §59.6.1.2., Division 59.6.1 does not apply to development in single-family residential zones, such as the R-60 Zone involved in this case.

2. Parking Spaces Required, Parking Facility Design and Parking Lot Screening

Conclusion: The standards for the number of parking spaces required, parking facility design and parking facility screening are governed by Division 6.2 of the Zoning Ordinance. However, because the subject site is a detached home and does not have an on-site parking facility for 5 or more parking spaces, the Code sections pertaining to parking facility design and screening do not apply in this case. *See Zoning Ordinance §§59.6.2.5.A.1 and 59.6.2.9.A.3.*

The required number of vehicular parking spaces is established by Zoning Ordinance §59.6.2.4., and is summarized in the last line and the footnote of Staff Table (Exhibit 20, p. 6). It is reproduced on Page 25 of this Report and Decision.

As can be seen from that Table, Section 59.6.2.4 of the Zoning Ordinance requires a total of 4 vehicle parking spaces for the subject site (2 spaces for the single-family dwelling and 2 for the child-care facility’s non-resident employee), but Zoning Ordinance §59.6.2.4.B. expressly permits parking spaces for Group Day Care to be provided on the street abutting the site to satisfy this requirement. As discussed in Part II.C.2. of this Report and Decision, the proposed Group Day Care also needs an area where parents can safely drop off and pick up children.

The subject site has two parking spaces in its parking pad. There are also two spaces available in front of the Applicant’s home on Weaver Street. Technical Staff recommended requiring staggered drop-offs and pickups, and concluded that the parking to be provided would be adequate for the use, as long as the Applicant is required to follow a schedule limiting the use

to one vehicle for drop-off/ pick-up operations every 15 minutes during both the morning and evening peak periods (Exhibit 20, pp. 8-9).

The Hearing Examiner agrees and has imposed a condition requiring the staggered drop-offs and pick-ups. Moreover, since some drop-offs and pick-ups may occur on the street, he has imposed an additional condition for safety, requiring that:

Children must be accompanied by an adult to and from the child-care entrance, and when drop-offs or pickups are made by vehicle outside of the Applicant's driveway, children must embark or disembark the vehicle from the curb side.

Finally, Zoning Ordinance §59. 6.2.4.C. requires one long-term bicycle parking space for this use. The Applicant has requested a waiver of this requirement, and both Technical Staff and the Planning Board recommended approval of the requested waiver (Exhibit 20, p. 9 and Exhibit 21). Technical Staff set forth its rationale for supporting the waiver request in its report (Exhibit 20, p. 9), and it is quoted on Page 11 of this Report and Decision. Given this evidence, the Hearing Examiner finds that a waiver of the requirement for a bicycle parking space on this site is appropriate, and that waiver is granted in Part IV of this Report and Decision.

Based on this record, the Hearing Examiner finds that there is sufficient room for parking on the driveway and on the street abutting the subject site to accommodate the resident's parking, the non-resident employee parking and the drop-off and pickup operations of the proposed Group Day Care. All other applicable requirements have either been met or waived.

3. Site Lighting, Landscaping and Screening

Standards for site lighting are set forth in Division 6.4 of the Zoning Ordinance, and the standards for landscaping and screening are mainly set forth in Division 6.5.

a. Lighting

Zoning Ordinance §59.6.4.4.E. provides:

E. Conditional Uses

Outdoor lighting for a conditional use must be directed, shielded, or screened to ensure that the illumination is 0.1 footcandles or less at any lot line that abuts a lot with a detached house building type, not located in a Commercial/Residential or Employment zone.

By its own terms (in §59.6.4.2), Division 6.4 does not apply to existing, unmodified lighting:

Division 6.4 applies to landscaping required under this Chapter, the installation of any new outdoor lighting fixture, and the replacement of any existing outdoor fixture. Replacement of a fixture means to change the fixture type or to change the mounting height or location of the fixture.
[Emphasis added.]

Conclusion: As discussed in Part II.C.3. of this Report and Decision, the house has residential type exterior lighting. No new lighting is planned for this conditional use, and therefore the Hearing Examiner finds that the requirements of Division 6.4, regarding lighting, do not apply. Nevertheless, as observed by Technical Staff, “The existing on-site lighting is residential in nature and will not create a problem with illumination on abutting properties.” Exhibit 20, p. 9.

b. Site Screening and Landscaping

Conclusion: Although some provisions in this portion of the Zoning Ordinance contain very specific screening requirements, the review of site landscaping and screening for conditional uses in single-family, detached homes is limited to an assessment of compatibility. Zoning Ordinance §59.6.5.2.B. This language is reinforced by Section 59.7.3.1.E.1.b., under which the Hearing Examiner need only find that the proposed use meets applicable general requirements under Article 59-6 “to the extent the Hearing Examiner finds necessary to ensure compatibility. . .”

With regard to Screening and landscaping, Technical Staff observed that “The site is well landscaped,” and since there will be no physical changes to the property or structure under this request, “The existing on-site landscaping and screening will continue to ensure the compatibility of this conditional use to the surrounding neighborhood.” Exhibit 20, pp. 10 and 13.

There is no contrary evidence in the record. The Hearing Examiner therefore finds that the existing landscaping will be adequate to ensure compatibility with the neighborhood, and thus will meet the requirements of the Zoning Ordinance.

4. Signage

Conclusion: The use of signage is governed by Zoning Ordinance Division 6.7. Zoning Ordinance §59.6.7.8.A. sets the standards for signs in Residential Zones; however, no sign has been proposed for the subject conditional use. Tr. 13.

Although the Applicant has not proposed any signage for the site, the Hearing Examiner imposed a condition in Part IV of this Report and Decision requiring any signage to comport with the requirements of Zoning Ordinance §59.6.7.8.A, without an option for a sign variance from the Sign Review Board. This condition is intended to ensure compatibility with the surrounding residential neighborhood. The Hearing Examiner's condition also prohibits the Applicant from posting a sign on the property unless it is first approved by the Department of Permitting Services (DPS) and a permit is obtained.

IV. CONCLUSION AND DECISION

As set forth above, the application meets all the standards for approval in Articles 59-3, 59-4, 59-6 and 59-7 of the Zoning Ordinance. This is not an application to establish a new child care facility on the subject site; rather, it is an application to add 4 children to an already functioning child care facility on the site. While any daycare may have some adverse effects on the immediate neighbors in terms of noise and commotion during outdoor play, and traffic on arrival and pickup, those effects are inherent in the use.

As stated by Technical Staff (Exhibit 20, pp. 11-12):

The proposed use will be harmonious with the character of the surrounding one-family neighborhood. There are no new structures proposed by this conditional use

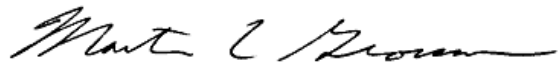
nor will the scale or design of the existing residential use increase in size. The activities and traffic conditions associated with the use will be limited to specific hours of operation and days of the week, as stated in the recommended conditions of approval. Therefore, the proposed use will not alter the character of the surrounding neighborhood in a manner inconsistent with the Master Plan.

Based on the foregoing findings and conclusions and a thorough review of the entire record, the application of Ana David d/b/a New Angels Childcare (CU 19-08), for a conditional use under Section 59.3.4.4.D. of the Zoning Ordinance, to operate a Group Day Care for up to 12 children in her home at 9408 Weaver Street, Silver Spring, Maryland, is hereby **GRANTED**, subject to the following conditions:

1. The proposed Group Day Care must be limited to 12 children and two non-residential staff.
2. The hours of operation are limited to Monday through Friday, 7:00 a.m. to 6:00 p.m.
3. The Applicant must schedule staggered drop-off and pick-up of children with no more than one vehicle entering and exiting the site every 15 minutes during both morning and evening drop-offs and pick-ups. The Applicant must require written parental agreements so indicating for all children arriving by vehicle.
4. Outside play time may not start prior to 9:00 a.m. and may not extend beyond 5:00 p.m.
5. The Applicant must not display a sign for the child care facility unless it is first approved by the Department of Permitting Services (DPS) and a permit is obtained. Pursuant to Zoning Ordinance §59.6.7.8.A, a sign, if erected, must not exceed two square feet and must not be lighted. A copy of the permit must be filed with OZAH before any sign is posted.
6. All children must be under the direct supervision of a staff member at all times.
7. The Applicant must comply with and satisfy all applicable State and County requirements for operating a Group Day Care for children, and must correct any deficiencies found in any government inspection.
8. Children must be accompanied by an adult to and from the child-care entrance, and when drop-offs or pickups are made by vehicle outside of the Applicant's driveway, children must embark or disembark the vehicle from the curb side.
9. The Applicant must not use a public address system of any kind outside the building, and must not allow any amplified music to be played outside the building.

10. The Applicant must maintain the grounds in a clean condition, free from debris, on a daily basis.
11. The requirements of Zoning Ordinance §59.6.2.4.C. for a long-term bicycle parking space are hereby waived pursuant to Zoning Ordinance §59.6.2.10, in accordance with the recommendation of the Technical Staff and the Planning Board.
12. The Applicant must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the conditional use premises and operate the conditional use as granted herein. The Applicant shall at all times ensure that the conditional use and premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements, including the annual payment of conditional use administrative fees assessed by the Department of Permitting Services.

Issued this 18th day of October, 2019.



Martin L. Grossman
Hearing Examiner

NOTICE OF RIGHT TO REQUEST ORAL ARGUMENT

Any party of record may file a written request to present an appeal and oral argument before the Board of Appeals, within 10 days after the Office of Zoning and Administrative Hearings issues the Hearing Examiner's Report and Decision. Any party of record may, no later than 5 days after a request for oral argument is filed, file a written opposition to it or request to participate in oral argument. If the Board of Appeals grants a request for oral argument, the argument must be limited to matters contained in the record compiled by the Hearing Examiner. A person requesting an appeal, or opposing it, must send a copy of that request or opposition to the Hearing Examiner, the Board of Appeals, and all parties of record before the Hearing Examiner.

Contact information for the Board of Appeals is listed below, and additional procedures are specified in Zoning Ordinance §59.7.3.1.F.1.c.

Letters to the Board of Appeals may be mailed, utilizing the U.S. Postal Service, to:

Montgomery County Board of Appeals
100 Maryland Avenue, Room 217
Rockville, MD 20850

The Board's phone number and email address remain unchanged. They are:

(240) 777-6600

<http://www.montgomerycountymd.gov/boa/>

Physical deliveries to the Board of Appeals must be made to their temporary location at the Broome School, 751 Twinbrook Parkway, Rockville, Maryland 20851.

The Board of Appeals will consider your request for oral argument at a work session. Agendas for the Board's work sessions can be found on the Board's website and in the Board's office. You can also call the Board's office to see when the Board will consider your request. If your request for oral argument is granted, you will be notified by the Board of Appeals regarding the time and place for oral argument. Because decisions made by the Board are confined to the evidence of record before the Hearing Examiner, no new or additional evidence or witnesses will be considered. If your request for oral argument is denied, your case will likely be decided by the Board that same day, at the work session.

Parties requesting or opposing an appeal must not attempt to discuss this case with individual Board members because such *ex parte* communications are prohibited by law. If you have any questions regarding this procedure, please contact the Board of Appeals by calling 240-777-6600 or visiting its website: <http://www.montgomerycountymd.gov/boa/>.

NOTICES TO:

Ana David, Applicant and Owner
Barbara Jay, Executive Director, Montgomery County Board of Appeals
Gwen Wright, Director, Planning Department
Kathy Reilly, Planning Department
Ehsan Motazed, Department of Permitting Services
Greg Nichols, Manager, SPES at DPS
Michael Coveyou, Acting Director, Finance Department
Charles Frederick, Esquire, Associate County Attorney